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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ISHMAEL MWESIGWA,

Defendant and Appellant.

D047546

(Super. Ct. No. SCD185722)

APPEAL from a judgment of the Superior Court of San Diego County, Janet I. Kintner, Judge. Affirmed.

Ishmael Mwesigwa appeals from a judgment convicting him of corporal injury to a cohabitant and other offenses arising from his assault on his girlfriend. He contends (1) the trial court erred when it admitted evidence of a photograph of a cleaver, (2) the trial court erred when it refused to instruct regarding the defense of accident, (3) the evidence was insufficient to support his convictions, (4) the prosecutor committed prejudicial misconduct in closing argument to the jury, and (5) the trial court erred in denying

probation. We reject his contentions, except we agree the trial court should have instructed the jury regarding his accident defense. However, we find the instructional error harmless. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Victim Rimin Nakayama initially told law enforcement and medical personnel that Mwesigwa had assaulted her. However, by the time of trial she recanted and claimed her injuries were an accident. We summarize the testimony of an eyewitness who observed part of the altercation, Nakayama's statements shortly after the incident, Nakayama's recantation testimony and related testimony, and medical opinion testimony regarding the cause of Nakayama's injuries.

Eyewitness Sales's Testimony

Tanya Sales lived in a condominium unit upstairs from Mwesigwa and Nakayama's unit. In the afternoon of September 11, 2004, Sales heard a male repeatedly yelling "Get the f___ out." Sales looked out her dining room window and saw Mwesigwa and Nakayama standing outside the couple's unit. Nakayama's hair looked disheveled and she had blood on her right shoulder. Mwesigwa was standing by the door holding a shiny, sharp object in his left hand, but Sales could not see what the object was. Mwesigwa was pointing with his right hand toward an exit from the condominium complex, shouting in an angry tone, "I told you to get the f___ out!" Nakayama was crying and saying, "I don't understand. What did I do?" Nakayama asked Mwesigwa if she could "at least get [her] shoes," and Mwesigwa answered, "No. Get the f___ out."

Mwesigwa went into the unit, slamming the door behind him. He then came back out and threw Nakayama's shoes at her, hitting her thigh with one of the shoes.

When he threw the shoes at Nakayama, Mwesigwa still had the shiny object in his left hand. After he threw the shoes, he leaned against an archway with "his hands . . . above his head," allowing Sales to identify the object. She was about 10 to 15 feet away from Mwesigwa, still looking out her dining room window. Sales testified that the object "clearly . . . look[ed] like a cleaver." Mwesigwa was holding the cleaver up at an angle and Sales "could actually see the blade itself." She could not see the handle; it looked like Mwesigwa was holding the cleaver at the edge of the metal where it connected with the handle. Sales estimated the blade was about six inches long. Nakayama kept repeating that she did not understand and asking what she had done. With the cleaver still in his hand, Mwesigwa stated in a threatening tone, "Just get the f___ out. . . . Next time you just might end up f___ing dead."

Sales saw Mwesigwa go into his condominium unit and heard the door slam. Nakayama started walking towards the parking lot. Mwesigwa came out again and stated, "I thought I told you to get the f___ out." He pushed her to the parking lot by jabbing his finger in her back and walking with her. He had the cleaver in his other hand at his side. When he and Nakayama reached the parking lot, he shoved her, causing her to stumble towards a tree. Nakayama was still crying and asking what she had done. Nakayama left in her car and Mwesigwa returned to the condominium unit.

During the incident, Sales was on the phone with a 911 operator. Once she was able to identify the shiny object in Mwesigwa's hand, Sales stated to the operator: "[The

object] kind of looks like a metal . . . almost like . . . what is it, like a cleaver almost."

Before the police arrived at the unit, Mwesigwa left on his bicycle.

Nakayama's Statements Shortly After the Incident

Nakayama returned to the complex while the police were at the scene. She was crying and appeared to be afraid. She had a laceration above her eye that was bleeding heavily. She told the police she was in a fight with her boyfriend and stated her "boyfriend lost it. He's never done that before." Nakayama was reluctant to be treated by the paramedics and did not want to go to the hospital, but finally agreed to go. Nakayama told an officer that she was concerned her boyfriend would go to jail and be angry.

Nakayama suffered a laceration above her eyebrow which required nine stitches, a hematoma on the back of her scalp, and red bruises on her neck and chest. En route to the hospital, Nakayama told paramedic Eric Dunnick that her boyfriend hit her with his fist. She reported to triage nurse Paul Consiglio that she had been assaulted by her boyfriend. She told emergency room nurse Gayle Paddison that her boyfriend hit her on the head with his hand. Paddison asked Nakayama if her boyfriend was wearing a ring when he hit her, but Nakayama insisted he only used his hand. Regarding the bruises on her neck area, Nakayama told Paddison that her boyfriend tried to choke her. When treating physician Glenn Silverman asked Nakayama how she was injured, she stated she did not want to talk about it.

The police also questioned Nakayama at the hospital to try to assess the cause of her injuries. Nakayama was reluctant to answer questions and gave vague answers.

Nakayama told Officer William Miles that she and her boyfriend started to argue in the computer room after she returned from school; "things got a little crazy"; she did not remember exactly what happened; and she was told to leave the house. She stated she was not afraid of her boyfriend and she did not want to get him in trouble.

Later, Detective Holly Moore arrived at the hospital and stayed with Nakayama for about three hours until she was ready to go home. Nakayama told Detective Moore that she had asked Mwesigwa to help her look for a box of tampons; they commenced arguing about this; Mwesigwa then stood up in front of her; and all of sudden she noticed she was bleeding. When Detective Moore asked how she got the cut on her forehead, Nakayama answered she did not know. Detective Moore asked if Mwesigwa hit her, and Nakayama answered, "I think so." When asked if Mwesigwa hit her head or face, Nakayama stated she did not remember. When Detective Moore asked how she got the bump on the back of her head, Nakayama responded she did not know, but she thought Mwesigwa might have hit her. Detective Moore asked if Mwesigwa strangled her, and Nakayama answered: "Yeah, I think so. I don't know. Maybe I scratched myself or maybe he did." Detective Moore inquired whether Nakayama was trying to protect Mwesigwa, and Nakayama responded, "He is not a person like that. He's pushed me before, but he's not a person like that. We hit each other a couple of times before in the first few months we were together. Maybe he hit me. I don't know. He might have had a pen in his hand."

Nakayama's Recantation at Trial

At trial, Nakayama recanted her earlier statements that Mwesigwa had assaulted her. Nakayama was from Japan and had been in the United States for almost three years on a student visa.¹ She testified she wanted to marry Mwesigwa and felt bad that he was in trouble, but stated she would not lie to keep him out of trouble.

Nakayama testified that on the day of the incident she returned home from school and went into the bedroom to speak to Mwesigwa. Mwesigwa was sitting in a swivel chair using the computer and Nakayama was standing behind the chair. Because they had to move out of their condominium unit in two days, Nakayama asked Mwesigwa whether he had found an apartment. When he told her no, she complained about his failure to do so. Mwesigwa then quickly swiveled the chair to stand up, and the chair or some other object hit Nakayama. She fell backwards and hit her head.

Nakayama thought Mwesigwa may have accidentally "hit" her with the chair, and she may have tripped over the many packed-up boxes they had prepared for the move. She also believed she had her car key in her hand when she fell, and stated she may have hit her head on the key. She explained that Mwesigwa "turned real quick, and [she] fell real quick," and that the incident happened so quickly that she did not know what happened.

¹ Nakayama stated she spoke English but was not fluent. At her request she testified through a Japanese interpreter.

Nakayama testified that after she fell, Mwesigwa immediately asked if she was okay. He guided her to the bed, and told her she was bleeding and needed to go to the hospital. Nakayama told him she would not go because she did not have health insurance. They argued about whether she should go to the hospital, and Mwesigwa was angry because she did not want to go. Mwesigwa wanted to drive her to the hospital, but she refused to let him because she did not normally let other people drive her car.² Finally she agreed to drive herself to the hospital, although she did not intend to really do so. She went into the living room. A few seconds later Mwesigwa came into the living room. He was angry because she was still there. She again told him she did not want to go to the hospital because she did not have money, but Mwesigwa insisted that she had to go. They continued to argue about this, until Mwesigwa pushed her out the door.

Nakayama testified that as Mwesigwa pushed her out the door, he swore at her, telling her to "Get the f___ out." Nakayama agreed to go, but asked for her shoes. Mwesigwa was still upset and threw her shoes towards her. He came out to the parking lot and told Nakayama that if she did not go he would kick her car. Nakayama was puzzled as to why Mwesigwa was so upset, but she was not afraid.

Nakayama testified she drove away from the complex, but returned about five or 10 minutes later because she was worried about Mwesigwa. When she arrived back at the complex, police were there. She asked the police if Mwesigwa was alright. The

² Nakayama acknowledged that she did at times let Mwesigwa drive her car, including when she went to Japan.

police said a lot of things but she did not understand a lot of what they were saying because they were speaking very fast and she was in a state of panic. She told the police she did not understand. When she was interviewed by the police at the hospital she asked for a Japanese interpreter but was not provided one. When the police asked her what happened to her face, she told them she did not know what happened, and that all she remembered was she fell and she was bleeding. She denied telling the police that she did not want to get her boyfriend in trouble. She denied reporting to the police or medical personnel that her boyfriend hit her with his fist or tried to choke her. She testified Mwesigwa never had a cleaver or knife in his hand; he did not cut, hit or choke her; and he did not tell her that next time she might end up dead. She testified that she and Mwesigwa never had a cleaver at their condominium unit.

The law enforcement and medical personnel who spoke to Nakayama testified that she communicated well in English and she never gave any indication that she was having difficulty understanding what they said to her. These witnesses testified she never said her injuries were caused by an accident or that she fell and hit her face on boxes or keys.

Medical Opinions About the Cause of the Injuries

The medical personnel involved in Nakayama's care gave their opinions regarding the cause of her injuries. Dr. Silverman described Nakayama's facial laceration as "a clean cut" with a "little tag off of the main part of the laceration" giving it a "Y" shape. The wound was about three centimeters long and was "gaping," which meant it was open with "some depth" to it. Dr. Silverman stated a knife injury would cause a clean cut, and that Nakayama's injury could have been caused by a knife. It could also have been

caused by a punch if the assailant was wearing a ring. Dr. Silverman stated it could have been caused by a key if the key had a sharp edge, but opined this was unlikely. He stated the injury could not have been caused by a heavily-loaded cardboard box. Regarding the red marks on Nakayama's neck, Dr. Silverman stated they could have been caused by someone trying to choke her.

Nurse Paddison observed that the laceration above Nakayama's eyebrow appeared jagged and deep into the muscle tissue. Paddison thought the wound was too deep to have been caused by just a hand.

Paramedic Dunnick testified that impact injuries are caused by blunt force to the body, such as from an object or hands, and that these injuries usually produce swelling. Further, an impact injury near the eyebrow that breaks the skin will normally follow the line of the brow. In contrast, injury from a sharp object, such as a knife or bottle, will typically slice the skin without causing swelling. Dunnick testified there was no swelling around Nakayama's eye and the injury did not follow the line of her brow. He opined her injury was consistent with an injury from a sharp object and was not likely caused by a punch. Dunnick also stated the injury could have been caused by a fall on a heavily-loaded box if she fell on a sharp, hard surface; however, he thought this explanation "would be a stretch" because such a fall would cause more of an impact injury. Dunnick stated an injury from falling on a key would normally be more jagged than Nakayama's cut, unless the key looked like a knife.

Verdict and Sentence

Mwesigwa was charged with (1) count 1: corporal injury to a cohabitant (Pen. Code,³ § 273.5, subd. (a)); (2) count 2: assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); and (3) count 3: exhibiting a deadly weapon (i.e., a knife) in a rude, angry or threatening manner (§ 417, subd. (a)(1)). For counts 1 and 2, he was charged with personal infliction of great bodily injury (§§ 12022.7, subd. (e), 1192.7, subd. (c)(8)) and personal use of a dangerous and deadly weapon (i.e., a knife) (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)).⁴

According to the prosecution's theory of the case, Mwesigwa cut the victim with a knife and choked her inside the condominium unit, thus establishing the offenses of cohabitant corporal injury and aggravated assault⁵ with infliction of great bodily injury and knife use enhancements. Further, according to the prosecution's theory, he committed the offense of exhibiting a deadly weapon offense by displaying a cleaver in a rude or angry manner outside the condominium unit. The jury found Mwesigwa guilty as charged.

³ Subsequent statutory references are to the Penal Code unless otherwise specified.

⁴ For count 2, the information charged the personal weapon use enhancement only under section 1192.7, subd. (c)(23) [defining a serious felony] and not under section 12022, subd. (b)(1) [providing for a sentence enhancement when deadly weapon use is not an element of the offense].) (See *People v. McGee* (1993) 15 Cal.App.4th 107, 112-117.)

⁵ For convenience, we will at times refer to the count 2 assault with a deadly weapon or by means of force likely to produce great bodily injury offense as "aggravated assault."

The trial court sentenced Mwesigwa to six years in prison. His sentence consisted of the two-year lower term for count 1 cohabitant corporal injury, plus the three-year lower term for the great bodily injury enhancement and one year for the knife use enhancement. The court stayed a lower term sentence on count 2 aggravated assault, and imposed a concurrent sentence for count 3 exhibiting a deadly weapon.

DISCUSSION

I. Admission of Photograph of Cleaver

Mwesigwa argues the trial court erred in admitting into evidence a photograph of a cleaver. He asserts the photograph was irrelevant and its admission violated his due process right to a fair trial.⁶

The police did not find a cleaver at Mwesigwa's residence. At trial, Sales was shown a photograph of a cleaver, and testified that it looked similar to the object she had observed in Mwesigwa's hand. The cleaver in the photograph had been selected by Sales when she went to a store with an investigator from the district attorney's office to see if she could identify a knife similar to the one she saw during the altercation.

Prior to trial, Mwesigwa argued that the cleaver photograph should not be admitted because it was not relevant and it would prejudice the jury. To support this

⁶ The Attorney General contends Mwesigwa has forfeited a due process claim because he did not challenge the evidence on this ground but only raised a relevancy challenge before the trial court. Mwesigwa's relevancy objection permits him to raise a narrow due process argument that is confined to matters included in the trial objection and to an evaluation of whether the court's ruling "had the legal consequence of violating his due process rights." (*People v. Partida* (2005) 37 Cal.4th 428, 435-439.)

position, Mwesigwa asserted that no cleaver was found at the residence; the victim did not state the defendant used a cleaver and stated there was no cleaver at the house; and the only evidence was from Sales whose statements were not clear and who was several feet away during the incident. In response, the prosecutor argued that Sales described the weapon as a cleaver; she was in fairly close range to the incident; and she selected a similar weapon from the store.

The court rejected Mwesigwa's arguments, finding the fact that no weapon was found did not preclude the prosecution from presenting demonstrative evidence based on what a witness claimed the weapon looked like. The court weighed the evidence under Evidence Code section 352, and concluded the photograph was relevant because there was a disputed issue regarding what the weapon was and what it looked like, and there was no potential for prejudice if the photograph merely depicted what a witness would describe. At the conclusion of the prosecution's case in chief, Mwesigwa again objected to admission of the cleaver photograph, contending that the photograph was not an accurate depiction of what Sales claimed she saw. The trial court rejected this contention, stating the picture was "very helpful" because it was difficult to understand what the object was merely from a verbal description, and noting that Sales had described the differences between the cleaver in the picture and the object she observed at the scene.⁷

⁷ Sales testified that unlike the cleaver from the store, the cleaver she saw in Mwesigwa's hand was a little wider and shorter and it had a design of smooth, oval grooves on its blunt side.

On appeal, Mwesigwa presents arguments similar to the ones he presented to the trial court — i.e., the photograph of the cleaver was irrelevant because that particular cleaver was not involved in the crime, there was no cleaver found at the scene, and the victim never stated a knife was used. He also contends there was no showing the jury might not have known what a cleaver was, and there was no reason the jury needed to see a photograph of a cleaver to resolve disputed issues in the case. Additionally, he asserts there was no medical evidence that Nakayama's wound was caused by a cleaver or other type of knife.

The prosecution is entitled to use demonstrative evidence to illustrate a witness's testimony, including presentation of a weapon similar to the one connected with commission of the crime when the actual weapon is not found. (*People v. Roldan* (2005) 35 Cal.4th 646, 708-709 [no error from admission of gun which was similar to gun described by eyewitnesses and which assisted the jury in understanding evidence and testimony].) To properly admit the evidence, a foundation must be laid to show that the weapon is "'substantially similar to that which it seeks to illustrate.'" (*Id.* at p. 708.) Once a proper foundation is laid, "'admission [is] within the sound discretion of the trial court.'" (*Ibid.*)

The record does not show the trial court abused its discretion in admitting the photograph of the cleaver. Sales's testimony that she saw Mwesigwa holding a cleaver when he was swearing at the victim and pushing her to the parking lot established the relevancy of demonstrative evidence of a cleaver. A photograph of a similar cleaver was relevant to illustrate the object that Sales observed. A proper foundation was laid based

on Sales's testimony that the object she saw and the cleaver in the photograph were similar. The trial court reasonably concluded the prosecution could present a photograph of a cleaver similar to the one that a witness observed in the defendant's hand at the time of the altercation.

Because Sales's eyewitness observations of a cleaver established the relevancy of a cleaver photograph, it was not necessary that a cleaver be found at the scene or that the victim reported use of a cleaver in order to show relevancy. Further, because it is generally permissible to admit evidence to illustrate and help a jury understand a witness's testimony, there was no need for a specific showing that the jury might not have known what a cleaver was or that a photograph was necessary to resolve a particular disputed issue. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1135-1136.) Indeed, the demonstrative value of the cleaver photograph is shown from the fact that both the prosecutor and defense counsel referred to the photograph when questioning Sales about how Mwesigwa was holding the object.

To the extent Mwesigwa is asserting the court abused its discretion under Evidence Code section 352 because a photograph of a cleaver was unduly prejudicial, we reject this assertion. Evidence is unduly prejudicial if it is likely to "provoke emotional bias against a party or to cause the jury to prejudge the issues upon the basis of extraneous factors." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) The test for undue prejudice is whether the evidence "'uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,'" not the prejudice 'that naturally flows from relevant, highly probative evidence.'" (*People v.*

Padilla (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Even when photographs are disturbing, they may properly be admitted when they reflect the facts as described by the witnesses. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1168-1169.) The photograph of the cleaver merely reflected what Sales was describing and did not create a danger of causing the jury to evaluate the case based on extraneous factors.

Mwesigwa's assertion that there was no medical evidence that the victim's laceration was caused by a cleaver or other type of knife is contradicted by the record. Dr. Silverman was shown the photograph of the cleaver and testified that the laceration could have been caused by that type of knife. Paramedic Dunnick and nurse Paddison also viewed the laceration as likely to have been caused by a sharp object rather than from a fist punch alone. Mwesigwa's suggestion that a cleaver photograph was irrelevant absent *definitive* proof that the laceration was caused by a cleaver is unavailing. Because the evidence showed a reasonable possibility that the injury was from a knife cut, this was sufficient to support the relevancy of the cleaver evidence, including the photograph. (See Evid. Code, § 210 [relevant evidence is evidence having any tendency in reason to prove a disputed fact].) Moreover, independent of the issue of the cause of the laceration, a photograph of a cleaver was relevant to demonstrate Sales's eyewitness observations of the defendant's conduct at the time of the incident.

Citing *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, Mwesigwa asserts that the photograph of the cleaver from the store was inadmissible because it had no connection to the charged offense. The circumstances of this case are not comparable to

those in *Alcala*. The *Alcala* court found the defendant was deprived of a fair trial based on cumulative error, including the admission of two complete knife sets that were found in the home the defendant shared with his mother. (*Id.* at pp. 886-888.) The only connection between the crime and the knife sets was that both the suspected murder weapon (a knife found near the scene) and the knife sets were made by the same manufacturer, who distributed thousands of the knives to retail outlets. The *Alcala* court concluded there was nothing about the knife sets that connected the defendant to the murder weapon, and the prosecution committed constitutional error when it used the evidence to argue otherwise. (*Ibid.*) The posture of this case is entirely different, involving an eyewitness who saw the defendant holding a cleaver and admission of a photograph of a similar cleaver for demonstrative purposes.⁸

The trial court reasonably exercised its discretion to admit the cleaver photograph and its ruling did not deprive Mwesigwa of a fair trial.

II. *Failure to Give Accident Instruction*

Mwesigwa challenges the trial court's rejection of his request that the jury be instructed regarding his defense of accident in the language of CALJIC No. 4.45.

CALJIC No. 4.45 states: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor

⁸ Mwesigwa also cites *People v. Hill* (1899) 123 Cal. 571 and *People v. McCall* (1935) 10 Cal.App.2d 503 for the proposition that the cleaver photograph was inadmissible absent evidence it was the actual weapon used. Like *Alcala*, these cases do not stand for such a broad proposition and involve circumstances not present here.

purpose . . . he does not thereby commit a crime." When rejecting his request, the trial court reasoned that the crimes were general intent crimes, and the instruction defining the willfulness requirement covered the issue of accident because if an accident occurred there was no willfulness. The court stated the defense could argue its accident theory, but there was no reason to give the accident instruction.

We agree with Mwesigwa that the trial court erred in failing to give the accident instruction. A trial court must instruct regarding a defense if there is substantial evidence to support the defense. (*People v. Roldan, supra*, 35 Cal.4th at p. 715; *People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390 [sua sponte duty to instruct regarding accident defense]; *People v. Jones* (1991) 234 Cal.App.3d 1303, 1314 [same].) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . .'" (*People v. Salas, supra*, 37 Cal.4th at p. 982.) Nakayama's testimony that Mwesigwa quickly swiveled his chair, causing her to fall and injure herself, provided substantial evidence for an accident defense for counts 1 and 2 (the cohabitant corporal injury and aggravated assault offenses). Mwesigwa was entitled to an instruction focusing the jury's attention on this defense.

The instructions provided to the jury stating that the charged offenses must be committed willfully do not specifically refer to the concept of accident, and do not serve as an adequate substitute for a specific instruction on the defense. The jury was instructed that counts 1 and 2 were general intent crimes that had to be committed

willfully, and that the willfulness requirement is satisfied if the defendant intentionally does an act that results in injury (for corporal injury to a cohabitant) or that is likely to result in the application of physical force (for assault) even if the defendant had no intent to cause injury. (See CALJIC Nos. 9.35, 9.00, 1.20.)⁹

The general intent to willfully commit battery- and assault-related offenses focuses on the nature of the act and not on the perpetrator's specific intent. (See *People v. Williams* (2001) 26 Cal.4th 779, 786; *People v. Colantuono* (1994) 7 Cal.4th 206, 217.) Under the concepts of general intent and willfulness, when a defendant intentionally commits an act that injures another, or by its nature is likely to injure another, the act itself is deemed to satisfy the intent element for the offense and no showing of intent to injure is required. (See *People v. Williams, supra*, 26 Cal.4th at p. 786; *People v. Colantuono, supra*, 7 Cal.4th at pp. 214-215, 217; *People v. Thurston* (1999) 71

⁹ The offense of corporal injury to a cohabitant was defined as the willful and unlawful direct application of force that results in a traumatic condition. For this offense, "willfully" was defined as "a purpose or willingness to commit the act that results in corporal injury." (CALJIC No. 9.35.) "Assault" was defined as the willful commission of an act "which by its nature would probably and directly result in the application of physical force on another person," and with knowledge of "facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person" (CALJIC NO. 9.00.) For assault, "willfully" was defined as meaning "the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person." (CALJIC No. 9.00.) The jury was also instructed that for the lesser included offense of misdemeanor battery to a cohabitant, "'willfully'" means "a purpose or willingness to commit the act . . . in question. The word 'willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage." (CALJIC No. 1.20.)

Cal.App.4th 1050, 1053-1054.)¹⁰ The accident instruction clarifies for the jury that this definition of general intent and willfulness does not preclude a defense based on the defendant's accidental conduct, even if the conduct included intentional acts. (See § 26 [person who accidentally commits charged act is not culpable]; *People v. Gonzales, supra*, 74 Cal.App.4th at pp. 390-391.) As pointed out by Mwesigwa, the instruction was necessary to advise the jury that even if Mwesigwa intentionally swiveled in his chair and thereby caused Nakayama to fall and injure herself, he was not guilty if the injury was an accident.¹¹ The trial court should have given the accident instruction set forth in CALJIC No. 4.45.

However, under the circumstances of this case, we conclude the error was harmless even under the more stringent harmless beyond a reasonable doubt standard. (See *People v. Salas*, 37 Cal.4th at p. 984 [standard of prejudice for failure to instruct on affirmative defense not yet defined]; *People v. Gonzales, supra*, 74 Cal.App.4th at p. 391; *People v. Jones, supra*, 234 Cal.App.3d at p. 1316 [using harmless beyond a reasonable doubt standard]; *People v. Corning* (1983) 146 Cal.App.3d 83, 89 [using reasonable probability of more favorable outcome standard].) The prosecution's theory of the case

¹⁰ In *People v. Williams, supra*, 26 Cal.4th at pages 782 and 788, the California Supreme Court added a clarifying element to the mental state for assault, requiring that the person have knowledge of facts that would lead a reasonable person to realize that an injury was likely to result from the act.

¹¹ Although specific intent to injure is not an element of battery- and assault-related offenses, when the defendant raises the accident defense in the context of a case involving intentional conduct, the jury will have to inquire whether the defendant acted with innocent intention.

was that Nakayama's injuries were caused by Mwesigwa's assault on Nakayama, including cutting her face and choking her. The defense theory was that Nakayama's injuries were the result of an accident when Mwesigwa turned quickly in a swivel chair causing Nakayama to fall. In closing arguments to the jury, both the prosecutor and the defense made clear that criminal culpability for counts 1 and 2 required the jury to reject Nakayama's claim that her injuries arose from Mwesigwa's conduct of turning in his chair, causing her to fall.¹² Based on the facts of this case and counsels' arguments to the jury, we have no doubt that even without express instruction the jury understood that under accident principles Mwesigwa was not guilty of counts 1 and 2 if he merely turned quickly in his chair, even if this conduct was intentional and willful.

Additionally, the instructional error was not prejudicial because the jury's enhancement findings reflect that it necessarily found under other proper instructions that Mwesigwa's conduct did not involve the accidental infliction of injury. (See *People v. Jones, supra*, 234 Cal.App.3d at p. 1314.) As enhancements to counts 1 and 2, the jury found that Mwesigwa inflicted great bodily injury on Nakayama and that he used a knife

¹² The prosecutor conceded in closing argument that if the jury believed Nakayama's statements about the chair accident, Mwesigwa was not guilty. The prosecutor stated: "The credibility of Ms. Nakayama is this case, is she believable, because if you believe her, her version of what happened, the defendant isn't guilty of anything. He bumped into her with his chair and she fell. That's not a crime."

to commit the offenses.¹³ There were no facts suggesting that Mwesigwa was holding a knife when he turned in the swivel chair so as to accidentally strike Nakayama with a knife; thus the instructional error did not affect the knife use finding. The jury's finding that Mwesigwa used a knife when he inflicted injury establishes that it rejected the defense claim that Nakayama was accidentally injured.

This case is not in the same posture as *People v. Gonzales*, *supra*, 74 Cal.App.4th 382, where the appellate court reversed a cohabitant corporal injury conviction because of the trial court's failure to give an accident instruction. In *Gonzales*, the prosecution and the defense version of the facts both included the same act of the defendant opening a bathroom door which struck the victim in the head; during the deliberations the jury asked for a read-back of defense testimony pertinent to the accident defense and for clarification about the relationship between willfulness and an accident; and at one point deadlocked over the willful intent issue. (*Id.* at pp. 388-391.) Here, the prosecution and defense theories were premised on two distinct acts and the record does not show any jury confusion. Further, in *Gonzales* there was no enhancement finding adverse to the accident issue under other proper instructions.

¹³ The jury verdict states that Mwesigwa personally used a deadly weapon, without specifically referring to a knife. However, the information charges the deadly weapon use as a knife, and during closing arguments both counsel referred to the charged deadly weapon as a knife. Thus, the record reflects that the finding of deadly weapon use was based on a knife.

III. *Sufficiency of the Evidence*

When reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Ibid.*) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.)

Mwesigwa contends the evidence was insufficient to support the convictions for corporal injury to a cohabitant and assault with a deadly weapon or by means of force likely to produce great bodily injury and the knife use enhancements. He asserts the evidence showed that Nakayama's injuries were the result of an accident because she testified she was injured when Mwesigwa swiveled in his chair and caused her to fall. The argument is unavailing. The jury was not required to credit Nakayama's testimony that this was how she suffered her injuries, nor to interpret her statement that Mwesigwa "hit" her as meaning she was accidentally hit by the chair. Rather, based on other evidence in the record the jury could reasonably find that Mwesigwa attacked and cut Nakayama with a knife. This evidence included Nakayama's statements shortly after the incident that her boyfriend hit and choked her; Sales's observations of a cleaver in Mwesigwa's hand outside the condominium unit and his statement to a bleeding

Nakayama that next time she might die; and the medical opinion testimony that Nakayama's facial laceration was consistent with a knife cut and her neck bruises were consistent with choking. This evidence supports an inference that Mwesigwa assaulted Nakayama and that during the assault he cut her face with the cleaver. Contrary to Mwesigwa's suggestion, direct evidence of the cause of her injuries was not required; rather the jury was entitled to make its findings based on circumstantial evidence. (*People v. Thomas, supra*, 2 Cal.4th at p. 514.) Other evidentiary matters cited by Mwesigwa that could support a finding in his favor do not defeat the sufficiency of the evidence to support the challenged convictions and enhancements.

IV. *Prosecutorial Misconduct in Closing Argument*

Mwesigwa cites numerous instances of alleged prosecutorial misconduct, and asserts that the cumulative effect of the improper arguments deprived him of a fair trial. A prosecutor's misconduct violates the federal Constitution when it is so egregious that it creates an unfair trial, and violates the state Constitution when it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) A claim of prosecutorial misconduct may not be raised on appeal if the defendant did not object and request an admonition, unless these steps would have been futile or unable to cure the harm. (*Id.* at p. 820.) If prosecutorial misconduct violates the federal Constitution we review the error under the harmless beyond a reasonable doubt standard, and if it violates the state Constitution we use the reasonable probability of more favorable result standard. (*People v. Cook* (2006) 39 Cal.4th 566, 608; *People v. Harrison* (2005) 35 Cal.4th 208, 244.)

Mwesigwa argues the prosecutor misrepresented the evidence, vouched for the prosecution's case based on matters outside the record, impugned defense counsel's integrity, and misstated the law. Mwesigwa concedes he did not make these objections at trial, but contends the misconduct was so pervasive that objections and admonitions would have been futile. Alternatively, he contends counsel was ineffective for failing to make the objections. As we shall delineate, the record shows no improper argument, except one instance of minor, nonprejudicial error. Thus, Mwesigwa's assertions of misconduct fail on grounds of waiver, as well as on the merits, and counsel was not incompetent for failing to object.

A prosecutor is given wide latitude to vigorously argue the case and may make remarks based on the evidence and inferences drawn from the record. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Arias* (1996) 13 Cal.4th 92, 162; *People v. Earp* (1999) 20 Cal.4th 826, 862-863.) However, the prosecutor should not misstate the evidence or the law, attack the integrity of defense counsel, or vouch for the strength of the prosecution's case based on matters outside the record. (*People v. Hill, supra*, 17 Cal.4th at pp. 823, 829, 832; *People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) When evaluating the propriety of the prosecutor's comments to the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Harrison, supra*, 35 Cal.4th at p. 244.)

Misrepresenting the Evidence

Mwesigwa asserts the prosecutor committed misconduct by arguing: "He held [the cleaver] out in a rude or angry manner. That's what Tanya Sales testified to." Mwesigwa contends this misstates the evidence because Sales testified that Mwesigwa was not holding the cleaver in a threatening manner and was not holding it towards Nakayama. The prosecutor's argument on this point addressed count 3, exhibiting a deadly weapon in a "rude, angry, or threatening manner." (§ 417, subd. (a)(1).)¹⁴ The argument was made in rebuttal to a defense argument that the exhibiting a deadly weapon offense was not established given the nonthreatening manner in which Sales described Mwesigwa's holding of the cleaver, including the facts that he was not holding it out, waving it, or pointing it at the victim. The prosecutor retorted that the People did not have to prove he pointed it at the victim, as long as he displayed it in a rude or angry manner, which is what Sales testified to. The record shows that although Sales testified Mwesigwa was not holding the cleaver towards Nakayama and was not holding it in a threatening manner, she also testified he was shouting, cursing, and speaking in a threatening tone while holding the cleaver. This testimony was sufficient for the prosecutor to urge the jury to draw the inference from Sales's testimony that Mwesigwa was holding the cleaver "out" in a rude or angry manner so as to establish the exhibiting a deadly weapon offense. There was no misconduct in this argument.

¹⁴ In his briefing on appeal, Mwesigwa incorrectly assumes the prosecutor's argument on this point was directed to support count 2, assault with a deadly weapon.

Mwesigwa asserts the prosecutor committed misconduct by stating: "We have a picture of the type of weapon [Sales] saw in his hands." He contends this was a misstatement of the evidence because there were differences between the photograph and the cleaver observed by Sales in his hand, the photograph was an enlargement of the actual cleaver from the store, and Sales was unable to observe the handle of the cleaver in Mwesigwa's hand. The argument fails. Sales's testimony that the two cleavers were similar provided sufficient evidence to allow the prosecutor to properly argue that the picture depicted the type of weapon observed by Sales in the defendant's hand.

Mwesigwa complains about the prosecutor's description of Sales's selection of the cleaver at the store, when the prosecutor stated: "No one said, 'Okay. This is a cleaver. Pick this knife.' No one said, 'Okay. Come over here and look at the cleavers.'" He contends this argument refers to matters not in evidence because there was no testimony regarding whether these types of statements were or were not made during Sales's selection of the cleaver at the store. During cross-examination, defense counsel asked Sales whether she was told "to pick out something similar to a cleaver." Sales answered, "No. He said [to pick out] something similar to what I'd seen." Based on this testimony, the prosecutor could properly urge the jury to infer that the prosecution did not lead Sales to pick out a cleaver at the store but that she selected the object of her own volition.

Mwesigwa contends the prosecutor misrepresented the evidence when she argued: "And the defense attorney said that someone testified that her injury could have been caused by a key. Well, you heard all the testimony, and nobody came in here and said that the injury could have been caused by a key." He argues that this was error because

Dr. Silverman testified that Nakayama's injury could have been caused by a key if it had a sharp edge. The record shows Dr. Silverman testified that a key with a sharp edge could have caused the injury, but in his opinion it was unlikely and that he had never seen an injury like Nakayama's caused by car keys. After stating that no one testified the injury could have been caused by a key, the prosecutor added: "In fact, the doctor said in 26 years as an ER doctor he has never seen a key cause an injury like that." Although the prosecutor's argument that no one testified the injury could have been from a key was not entirely accurate, we are satisfied the jury understood it was derived from Dr. Silverman's caveat that key causation, although possible, was improbable. There is no reasonable likelihood the jury used the remark to inaccurately construe the evidence.

Vouching

Mwesigwa asserts the prosecutor vouched for the prosecution's case by invoking the prestige of the district attorney's office when she argued: "If you believe beyond a reasonable doubt that he used a knife, and that's the only evidence, we see him with a knife and all the medical staff say the injury's consistent with a knife, we didn't see it happen, what more could be presented to prove beyond a reasonable doubt that it was a knife that was used? We have enough to prove the knife was used." Read in the context of the facts of this case, the prosecutor was arguing that given that there was no eyewitness to the incident inside the condominium unit and the victim's recantation, the prosecution had presented all possible evidence on the knife use allegation based on the observation of the defendant with the knife outside the unit and the medical evidence supporting a knife-inflicted injury. This was permissible argument and did not suggest

the jury should afford any special consideration to the prosecution's evidence from the prestige of the district attorney's office.

Mwesigwa contends the prosecutor personally vouched for the credibility of the two nurses who spoke with Nakayama and eyewitness Sales when the prosecutor argued that none of these witnesses had a motive to lie. He contends there was no evidence these persons were unbiased. The record shows that none of the witnesses were personally involved in the altercation between the defendant and the victim, the nurses were professional medical personnel, and Sales had no preexisting relationship with the defendant or victim.¹⁵ From this information in the record, the prosecutor could properly argue to the jury that these witnesses had no reason to fabricate their observations.

Impugning Defense Counsel

In a related argument, Mwesigwa contends the prosecutor's arguments that prosecution witnesses had no motive to lie impugned defense counsel by suggesting that defense counsel was accusing these witnesses of lying. The prosecutor's arguments that witnesses were unbiased observers did not suggest they had been called liars by opposing counsel.

Mwesigwa asserts the prosecutor denigrated defense counsel by stating during rebuttal: "Defense attorney argued, 'It doesn't matter Ms. Nakayama's story is all over the

¹⁵ Sales testified that she did not know her neighbors, and that she only knew Nakayama by sight in passing.

place and that the details don't match up. It doesn't matter." Read in context of the arguments by both sides, the jury would have understood that the prosecutor meant that Nakayama's testimony was not plausible, and that defense counsel's arguments based on her testimony ignored this implausibility. This did not exceed the bounds of permissible vigorous argument.

Mwesigwa contends the prosecutor implied that defense counsel sought to deceive the jury when she asserted "defense [counsel] wants you to believe that I have to prove all kinds of other things," and then explained to the jury the matters she did not have to prove for the exhibiting a deadly weapon offense (i.e., she merely had to prove he displayed the weapon in a rude, angry, or threatening manner, and not, as suggested by defense counsel, that he pointed it at the victim or was going to use it on the victim). The prosecutor's statement was rebuttal argument in response to defense counsel's argument that the defendant held the cleaver in a benign manner. There is no reasonable likelihood the jury viewed the statement as an attack on the integrity of defense counsel.

Misstating the Law

Mwesigwa contends that for the count 1 offense of corporal injury to a cohabitant, the prosecutor improperly argued, "I don't have to prove it was a knife. . . . I don't have to prove to you what he used to hit her in the face." He contends this was incorrect because the prosecutor had to prove knife use to support the deadly weapon enhancement for count 1. The record shows the prosecutor's argument that she did not have to prove knife use referred only to the corporal injury offense itself, not to the enhancement. The

prosecutor expressly told the jury that it should find the knife use enhancement true only if it concluded beyond a reasonable doubt Mwesigwa used a knife.

Mwesigwa contends the prosecutor argued to the jury that if she proved the crime of assault she did not need to prove the facts necessary to show the enhancements. He points to portions of the prosecutor's argument where she distinguished between the crimes and the enhancements; explained that proof of the elements of the crimes did not require proof of the enhancements; and pointed out that if the jury found Mwesigwa assaulted the victim with force (count 2), the infliction of great bodily injury enhancement was shown by the facts concerning her facial laceration. There was no suggestion by the prosecutor that she did not have to prove the facts supporting the enhancements.

Mwesigwa asserts the prosecutor misstated the law by arguing: "He assaulted her by hitting her, and his actions caused great bodily injury." The prosecutor's argument on this point pertained to the personal infliction of great bodily injury enhancement for the count 2 aggravated assault. Citing *People v. Jackson* (2000) 77 Cal.App.4th 574, Mwesigwa contends that the prosecutor's statement is contrary to the rule that "infliction" of injury requires a showing of a direct application of force on the victim by the defendant. In *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347, the court held that personal infliction of great bodily injury is not evaluated under proximate cause principles, but rather requires that the defendant's conduct directly cause the injury. In *Jackson*, the court applied this rule to the cohabitant corporal injury offense, and concluded that the defendant who pushed his girlfriend but who did not cause her to trip

and fall (when she was injured) had committed battery but did not "inflict" injury to establish the cohabitant injury offense. (*Jackson, supra*, at pp. 575-580.) However, the *Jackson* court noted that "[i]f the victim fell as a direct result of the blows inflicted by appellant, we would conclude that appellant inflicted the corporal injury she suffered in the fall." (*Id.* at p. 580.)

Here, the prosecutor argued to the jury that she had established the great bodily injury enhancement based on the evidence that Mwesigwa's act of hitting the victim caused great bodily injury. The prosecutor's statement properly described a direct application of force (i.e., hitting) by the defendant in accord with the legal definition of "infliction." Even under a theory that Nakayama injured herself when she fell as the result of an assaultive hit by Mwesigwa, this would constitute injury personally inflicted by the defendant. (*People v. Rodriguez, supra*, 69 Cal.App.4th at p. 351.) There was no misstatement of the law.

Mwesigwa argues the prosecutor misstated the law by asserting that she did not have to prove he pointed the cleaver at the victim or acted as if he was going to use the cleaver to attack the victim, but only that he used the cleaver in a rude or angry manner. Mwesigwa contends this was error because an assault requires violence that is about to be executed, not mere menace. Mwesigwa's contention is premised on an incorrect reading of the record. The prosecution's argument on this point addressed the count 3 exhibiting a deadly weapon offense, not the count 2 aggravated assault offense. There was no misstatement of the law.

Mwesigwa asserts the prosecutor erred when she argued she had to prove guilt beyond a reasonable doubt, but that this was not a "huge burden" and that "jurors just like you [] decide[] . . . every single day that crimes occurred beyond a reasonable doubt." The prosecutor's argument that the standard of guilt was not a huge burden was in response to defense counsel's assertion that it was a huge burden. Given that the jury was instructed on the meaning of beyond a reasonable doubt, and because defense counsel first characterized the standard as a huge burden, there is no likelihood the jury deviated from the correct guilt standard based on the prosecutor's rebuttal statement. We agree with Mwesigwa that the prosecutor should not have referred to the guilty verdicts of jurors in other cases, which is an irrelevant consideration. However, the statement was brief and tied to the rebuttal of the defense claim that the burden was huge. There was no prejudice.

For the same reasons set forth above, Mwesigwa has not established ineffective representation from defense counsel's failure to object to the prosecutor's closing arguments. (See *People v. Huggins, supra*, 38 Cal.4th at p. 206.)

V. Sentence

Challenging his six-year prison sentence, Mwesigwa contends (1) the trial court abused its discretion by denying his request for probation, (2) the trial court was biased against him, and (3) the court was unaware that counseling would have been a mandatory, enforceable term of probation.

Background

August Sentencing Hearing

Mwesigwa's sentencing hearing commenced on August 26, 2005. According to information in the probation report, Mwesigwa, age 20 at the time of the offense, has an associates degree in computer science, and his future plans include obtaining a university engineering degree and going to Africa to build schools. He has been employed in computer sales and other jobs. He has no prior criminal record. Mwesigwa's father, who is originally from Africa, is a college professor and his mother is a registered nurse.

On his attorney's advice, Mwesigwa did not make a statement about the incident to the probation officer, but relied on his preliminary hearing testimony. At the preliminary hearing, Mwesigwa testified that the victim fell and injured herself on boxes they were packing; he denied having a cleaver in his hand although he had a screwdriver earlier that day; and he pushed the victim outside and cursed at her to make her get medical attention.

Defense counsel requested probation, stating the incident was isolated, the defendant needed rehabilitation and counseling, and a prison sentence would not be helpful. Mwesigwa's family members and friends, including his mother and father, submitted letters and spoke on his behalf at the sentencing hearing. They stated that he was a compassionate and caring person who was involved in the community and advancing his studies. They urged a grant of probation so he could continue his education and contributions to society. The victim also requested probation, stating that the defendant was a peaceful and loving person.

The district attorney requested an eight-year sentence, noting that even though the defendant had strong family support he posed a danger to the community because no one knew why he erupted to commit this horrible crime, including threatening the victim that next time she might end up dead. Further, because he denied that he had committed any type of violence and showed no remorse, it was unlikely he would get help to address his conduct.

The probation officer agreed an eight-year sentence was warranted. The probation officer noted that the defendant was presumptively ineligible for probation because he used a deadly weapon and inflicted great bodily injury. However, he could be deemed eligible due to his youthfulness and lack of prior criminal record. The probation officer recognized that the defendant had no known criminal or violent history, was well-educated, had no substance abuse issues, and most likely could adhere to all conditions of probation. However, the probation officer concluded an eight-year prison sentence (based on middle terms) should be imposed because the defendant engaged in vicious, cruel, and life-threatening behavior merely in response to a verbal argument, which could indicate "his temper may be set off at any time without much provocation."

The trial court stated that it had spent a great deal of time considering the matter, and it was not an easy case because the defendant had no prior criminal record. The court noted the positive information from family members and the victim, but observed that it had "heard nothing from the defendant to convince [it] that he is an appropriate candidate for probation." The court stated the evidence was "overwhelming" that the defendant egregiously attacked and injured the victim; the victim was "trying to save the defendant

from what he did"; and the defendant was refusing to take responsibility for his actions which made him extremely dangerous. After further argument by defense counsel, the trial court granted a two-week continuance so the defense could obtain a psychological evaluation.

September Sentencing Hearing

At defense counsel's request, Dr. Meredith Friedman evaluated Mwesigwa on September 1 and 7, 2005. Mwesigwa disclosed to Dr. Friedman that before the September 2004 incident his relationship with Nakayama had become strained because he was experiencing financial difficulties and Nakayama would "constantly put[] [him] down." On the day Nakayama was injured, "[s]he kept putting [him] down" because he had not found an apartment for them to move to, and then she asked him to find her tampons because she had started her period and was bleeding heavily. He was insulted that she would ask him to do that and did not know where to look amidst the packed boxes. He stood up quickly from his desk chair; she fell backwards and they noticed she was bleeding. She refused to let him help her get up and accused him of doing this to her. By this point he was in a rage and started "freaking out"; he thought he punched her and "might have jerked her up by the neck." He pushed her out of the apartment because she did not want his help. He had earlier been using a "knife like tool" (not a cleaver) to take "cable stuff" apart, and he picked up this tool to resume the task. He stated he did not cut her with the tool, and the cut might have been caused by keys or something in the boxes she fell on.

Mwesigwa told Dr. Friedman he was open to attending domestic violence and anger management classes. Dr. Friedman observed that as the interview progressed, Mwesigwa was able to express regret for having harmed Nakayama in an enraged state, although he remained adamant that he had not assaulted her with a weapon of any kind. Dr. Friedman opined that given that Mwesigwa was not exposed to domestic violence in his childhood, that he had no history of violence or substance abuse, and that he did not act out of jealousy, his likelihood of recidivism was low. Dr. Friedman stated he could profit from anger management and domestic violence programs, and concluded that "with intervention his prognosis not to reoffend [was] felt to be good."

The sentencing hearing was resumed on September 14, 2005. Defense counsel asserted that although Mwesigwa needed to be punished, he was also a young man who could be "saved" and become a productive member of society if given help and counseling, and that he was "very willing to abide by the terms of probation." Mwesigwa addressed the court, stating that he was "deeply sorry" for what occurred; that the incident "was totally out of [his] character"; and he "was in a rage and lost control of [himself] because [he did not] know how to deal with the situation." He acknowledged he fought with Nakayama, but reiterated that the injury to her face was not inflicted by a knife and was not intentional.

The probation officer continued to recommend a prison sentence, as did the district attorney. The district attorney noted that he still refused to acknowledge that "he took a knife to the victim's face," which continued denial indicated he was not amenable to counseling. Defense counsel retorted that if Mwesigwa was repressing his anger and

was in denial of what happened, "counseling [was] seriously necessary" and "[p]rison [was] not the answer."

The trial court stated that it had considered Dr. Friedman's report and reread the probation report, and again concluded that prison, not probation, was appropriate. The court stated its view that the incident was not an accident; the defendant clearly cut the victim's face; and his vindictiveness continued when he kicked the bleeding victim out of the home, threw her shoes at her, and yelled that next time she might end up dead. The court stated his conduct was "extremely scary" and callous; he had lied to "try and save himself"; and he had not exhibited remorse for the victim. The court stated the defendant should get counseling, but it doubted "he [would] do it by granting him probation." The court concluded there was no reason to deviate from the presumptive prison term, and denied the request for probation. Because of his lack of prior record, the court selected lower terms and imposed a six-year sentence.

Analysis

Denial of Probation

For offenses involving deadly weapon use and willful infliction of great bodily injury, the defendant is ineligible for probation unless the trial court finds the case is an "unusual case[] where the interests of justice would best be served" by a grant of probation. (§ 1203, subds. (e)(2), (3).) To overcome this statutory prohibition of probation, California Rules of Court,¹⁶ rule 4.413, subdivision (c)(2) delineates three

¹⁶ Subsequent references to rules are to the California Rules of Court.

facts limiting the defendant's culpability that "may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate." The three facts are: great provocation, coercion or duress during the crime and no recent record of violence; the existence of a mental condition amenable to treatment; or youth and lack of significant prior record. (Rule 4.413(c)(2)(A)-(C).) Rule 4.413(b) provides that if the statutory prohibition on probation is overcome, the court should then consider the criteria set forth in rule 4.414 that are normally applied to determine if probation is appropriate, including facts related to the crime and to the defendant.

A trial court has broad discretion to grant or deny probation and its decision will not be disturbed unless the court acted in an arbitrary or capricious manner. (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.) An appellate court's function is to determine whether the trial court's order "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) The burden is on the party attacking the trial court's sentencing decision to show the decision was irrational or arbitrary. (*Ibid.*)

Mwesigwa contends the court abused its discretion in denying probation because he met all three of the criteria listed in rule 4.413 limiting a defendant's culpability and overcoming the prohibition on probation: i.e., he was under great stress from the upcoming move and had no history of violence; there was a high likelihood he would respond favorably to mental health care; and he was young and had no criminal record. Further, he asserts he satisfied other criteria warranting probation, including education, employment, strong family support, and lack of criminal sophistication. He asserts that

because he is a productive young man and his criminal conduct was an aberration, probation was appropriate.

To support his position, Mwesigwa cites the factual circumstances of a case where the trial court *granted* probation and the appellate court denied the People's writ petition challenging this decision. (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 825.) His reliance on this case ignores the rule that an appellate court will not overturn a trial court's discretionary decision to grant or deny probation unless it is arbitrary or capricious. Here, the trial court denied probation, and the record does not show this was an arbitrary, unreasoned decision. To the contrary, the record reflects the trial court gave considerable thought to the matter and carefully weighed the factors pertinent to a grant or denial of probation. The fact that Mwesigwa could have reasonably been granted probation based on the factors he has cited did not compel the trial court to grant probation when there were other legitimate factors supporting a prison sentence.

In concluding probation was inappropriate, the trial court relied on the high degree of callousness associated with the crime; the defendant's lack of remorse for the victim, and the defendant's continued refusal to take responsibility for the infliction of the knife cut on the victim's face. Although the evidence was conflicting on the issue of whether Mwesigwa injured the victim with a knife, the jury was persuaded he did so and the trial court believed the evidence on this point was strong. It is not our role to second guess these factual determinations when there is support for them in the record. The trial court also considered Mwesigwa's behavior after Nakayama was bleeding and injured, including threatening to kill her next time and kicking her out of the home. These factors

provided a reasonable basis for the court's decision to deny probation. (See rule 4.414 [factors to consider include seriousness and circumstances of the crime, weapon use, infliction of injury, and lack of remorse]; see also *People v. Bolton* (1979) 23 Cal.3d 208, 217 [trial court may consider whether grant of probation would "'unduly depreciate the seriousness of the offense'"].)

Bias

Mwesigwa asserts the trial court made its decision based on personal bias because it stated its personal opinion that the victim lied for the defendant, that the defendant had no remorse for the victim, and the defendant had lied to the court. These statements do not reflect personal bias, but merely show the trial court's assessment of the circumstances surrounding the offense and the defendant. These determinations are part of a sentencing court's discretionary decision making and are not improper.

Mwesigwa additionally contends that the trial court showed personal bias because it made the "absurd" comment, unrelated to rational decision making, that "[w]anting to build schools in Africa is good. But gosh, there is more to life than that." Mwesigwa leaves out the trial court's next statement that, "You can't treat a person this way. You can't treat this woman this way." Read in context, it is apparent the trial court was commenting that although building schools was a laudable goal, it did not diminish the fact that the defendant committed a violent crime against his girlfriend. The record does not show personal bias.

Trial Court's Awareness of Counseling as Mandatory Term of Probation

Mwesigwa asserts the trial court did not realize it had the duty to order domestic violence counseling as a condition of a grant of probation and it had the power to enforce the counseling order. He cites the trial court's statement: "The defendant should get some kind of counseling, but I really doubt he will do it by granting him probation. So probation is denied." This statement was made after the trial court had heard the parties' arguments and explained its reasons for denying probation. The court was apparently responding to defense counsel's assertions that the interests of justice would be best served by granting probation and counseling rather than a prison term.

When a defendant is granted probation in a domestic violence case, section 1203.097, subdivision (a)(6), requires the court to impose a mandatory term of probation requiring the defendant to successfully complete a batterer's counseling program. (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 39.) Under the statutory scheme, if the defendant fails to perform satisfactorily in the counseling program, the court terminates the defendant's participation in the program and proceeds with sentencing. (§ 1203.097, subd. (a)(12).) Defense counsel's request for probation and counseling implicitly recognized that a grant of probation would include a counseling order as a term of probation. There is nothing in the record to indicate that the trial court did not know counseling would be a mandatory term of probation and that the order could be enforced by the threat of probation revocation. In context, the trial court's statement reflects its assessment that Mwesigwa would not successfully complete a counseling program because he was not truly prepared to accept responsibility for his behavior, and thus this

was not a factor supporting a probation grant. Mwesigwa's assertion that the trial court was not aware of its duty and power to order counseling as a condition of probation is unavailing.

We note the trial court was not required to grant probation merely because Mwesigwa might have complied with a counseling probation term in order to avoid prison. Probation is an act of leniency (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185), and a trial court is not required to grant it merely because a defendant might be willing to attend mandatory counseling. The trial court was entitled to consider all the circumstances of the case, including the violent nature of the crime, Mwesigwa's callous behavior and threatening statement after the injury, his initial denial at the preliminary hearing that he attacked the victim, and his belated admission of violence when he was trying to avoid prison. The record does not show the trial court abused its discretion in denying probation.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.